Nik Omar bin Nik Man v Bank Simpanan Nasional

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO–K–01–1 OF 2004
NIK HASHIM, ARIFIN ZAKARIA FCJJ AND MOKHTAR SIDIN JCA.
13 JANUARY 2005

Labour Law — Employment — Termination of employment — Whether appellant a probation officer or has been placed on permanent and pensionable establishment — Whether it was open to respondent to terminate service of appellant without giving reason for it — Whether this was a colourable exercise of power of termination

The offer of employment by the respondent to the appellant was made through the letter. The appellant accepted the offer and commenced work. The appellant was required to be placed on probation for the period of one to three years and during that period the appellant's service may at any time be terminated. Clause 3 of the letter, however, provided that the post offered was 'permanent and pensionable'. By a letter of the Pension Division of Public Services Department, the appellant was given the pensionable status. By that it meant that the appellant had been confirmed in his employment and had been placed on a permanent and pensionable scheme. Then came the 'Surat Tawaran Saraan Bank Simpanan Nasional (SSBSN) kepada Kakitangan Tetap Bank Simpanan Nasional'. It was pertinent to note that this offer was addressed to permanent employees of the respondent. The appellant accepted SSBSN offered by the respondent. The appellant had, for some reasons, on and off absented himself from office. He claimed that he was absent for health reason for which he was undergoing some treatments. This problem started in 1997 until his service was terminated by the respondent through its letter. The termination was to take effect restropectively.

Held, allowing the appeal:

(1) The respondent acted under paras 47.1 and 48.2, Terma Dan Syarat-Syarat Perkhidmatan Bank Simpanan Nasional ('Bab A') and the terms and conditions of service found in paras 2(c) and 2(d) of the letter of offer. Paragraphs 2(c) and 2(d) clearly have no application to the appellant since the appellant was no longer a probation officer. The appellant had been placed on permanent and pensionable establishment (see para 10).

(2) It was not open to the respondent to terminate the service of the appellant simply on the premise that his service was no longer required without giving reason for it. It should be realised that what the respondent purported to do here would have dire consequences on the appellant. He will not only lose his employment but he would also be deprived of his pension benefit. Having been confirmed in the post and emplaced on the pensionable scheme the appellant's service could not be terminated by due notice under para 48.2 of Bab A (see para 15 and 16).

(3) What happened in this case was a colourable exercise of the power of termination under para 48.2 of Bab A, as a cloak for dismissal. What the respondent in fact intended to do here was to dismiss the appellant from the service of the respondent because of his prolong absence from office. However, instead of proceeding under the disciplinary procedure the respondent chose what it believed to be a less cumbersome procedure by resorting to para 48.2 of Bab A (see para 17); *Chartered Bank Bombay v the Chartered Bank Employees' Union* AIR 1960 SC 919 followed.

[**Bahasa Malaysia summary**

Tawaran pekerjaan oleh responden kepada perayu dibuat melalui surat. Perayu menerima tawaran dan memulakan pekerjaan. Perayu dikehendaki berada dalam tempoh percubaan untuk tempoh selama satu hingga tiga tahun dan dalam tempoh tersebut perkhidmatan perayu boleh ditamatkan pada bila-bila masa. Klausa 3 surat tersebut, walau bagaimanapun, menyatakan bahawa jawatan yang ditawarkan adalah 'kekal dan berpencen'. Melalui satu surat daripada Bahagian Pencen Jabatan Perkhidmatan Awam, perayu diberi status berpencen. Ini bermakna perayu telah disahkan jawatannya dan telah diletakkan dalam skim kekal dan berpencen. Kemudiannya 'Surat Tawaran Saraan Bank Simpanan Nasional (SSBSN) kepada Kakitangan Tetap Bank Simpanan Nasional'. Adalah berkaitan untuk diambil perhatian bahawa tawaran ini dialamatkan kepada kakitangan tetap responden. Perayu telah menerima SSBSN yang ditawarkan oleh responden. Perayu, atas sebab-sebab sering tidak hadir kepejabat. Beliau mendakwa bahawa beliau tidak hadir atas sebab-sebab kesihatan yang beliau sedang jalani rawatan. Masalah ini bermula pada 1997 sehingga perkhidmatan beliau ditamatkan oleh responden melalui suratnya. Penamatan tersebut berkuatkuasa secara retrospektif.

Diputuskan, membenarkan rayuan itu:

(1) Responden telah bertindak di bawah perenggan 47.1 dan 48.2, Terma Dan Syarat-Syarat Perkhidmatan Bank Simpanan Nasional ('Bab A') dan terma-terma dan syarat-syarat perkhidmatan dinyatakan dalam perenggan 2(c) dan 2(d) surat tawaran itu. Perenggan 2(c) dan 2(d) dengan jelas tidak terpakai kepada perayu memandangkan perayu bukan lagi pegawai di bawah tempoh percubaan. Perayu telah diletakkan dalam kakitangan kekal dan berpencen (lihat perenggan 10).

(2) Adalah tidak terbuka kepada responden untuk menamatkan perkhidmatan perayu hanya dengan premis bahawa perkhidmatan beliau tidak lagi diperlukan tanpa memberikan sebab baginya. Perlu disedari bahawa apa yang hendak dilakukan oleh responden di sini mempunyai kesan yang besar ke atas perayu. Beliau bukan hanya akan kehilangan pekerjaan tetapi juga akan kehilangan faedah pencen. Setelah disahkan jawatan dan diletakkan dalam skim berpencen perkhidmatan perayu tidak boleh ditamatkan melalui notis di bawah perenggan 48.2 Bab A (lihat perenggan 15 dan 16).

(3) Apa yang berlaku dalam kes ini adalah penggunaan kuasa penamatan yang tidak betul di bawah perenggan 48.2 Bab A, sebagai menyelindungi pemecatan. Apa yang sebenarnya hendak dibuat oleh responden adalah untuk memecat perayu daripada perkhidmatan responden kerana ketidakhadiran ke pejabat yang berpanjangan. Walau bagaimana pun, daripada meneruskan dengan tindakan disiplin, responden telah memilih apa yang dipercayai sebagai prosedur yang kurang rumit dengan menggunakan perenggan 48.2 Bab A (lihat perenggan 17); *Chartered Bank Bombay v the Chartered Bank Employees' Union* AIR 1960 SC 919 diikut.]

Notes

For cases on termination of employment, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1070–1140.

Cases referred to

Chartered Bank Bombay v the Chartered Bank Employees' Union AIR 1960 SC 919 (folld)
Dr A Putt v Assunta Hospital [1981] 1 MLJ 304 (refd)
Gnanasundram v Government of Malaysia [1971] 1 MLJ 208 (refd)
Goon Kwee Phoy v J&P Coats (M) Bhd [1981] 2 MLJ 129 (refd)
Ratnam Bikal Seevaratnam v Government of State of Pahang [1982] 1 MLJ 16 (refd)

Legislation referred to

Bank Simpanan Nasional Act 1974 ss 3, 6

Appeal from: Civil Suit No 21–06 of 1999 (High Court, Alor Setar)

Darshan Singh Khaira (Darshan Singh & Co) for the appellant.
Mohamad Sofee bin Razak (Noor Zihan Zain & Co) for the respondent.

Arifin Zakaria FCJ (delivering judgment of the court):

THE BACKGROUND

[1] This is an appeal against the decision of the learned High Court judge in dismissing the appellant/plaintiff's claim. After hearing submissions of counsel for the parties we allowed the appeal with costs and ordered that the appellant be reinstated to his original post and entitled to all the benefits according to the terms and conditions of service. We now give our reasons for our decisions.

[2] From the notes of proceeding it would appear that when the case was called up on 7 December 2003 before the High Court the parties applied to learned Judicial Commissioner (JC) for the matter to be decided by way of

written submissions and thus dispensing with the calling of witnesses. The learned JC allowed the application and the matter proceeded on that premise. Upon perusal of the appeal record before us we found that documents were filed by both parties, which are contained in Part C of the appeal record. It is not clear whether the parties had agreed to these documents or otherwise. However, since these documents are contained in the appeal record accordingly we will treat them as agreed documents both as to their authenticity and content. There was no agreed facts filed by the parties. Therefore, the facts as found by the learned JC must have been derived from either the pleadings or from the documents before the court.

THE FACTS

[3] The facts as may be gleaned from the pleadings and documents before the court are briefly as follows. The offer of employment by the respondent to the appellant was made through the letter of 22 June 1978. The appellant accepted the offer and commenced work on 1 July 1978. The letter of offer is found at pp 83 and 84 of the appeal record. Clause 2(c) of the letter of offer reads:

> (c) Tuan/puan akan berkhidmat di dalam percubaan selama satu hingga tiga tahun. Sekiranya tuan/puan tidak disahkan di dalam jawatan apabila tempoh percubaan tuan/puan tamat, perkhidmatan tuan/puan mungkin ditamatkan.

[4] This means that the appellant was required to be placed on probation for the period of one to three years and during that period the appellant's service may at any time be terminated. Clause 3 of the same letter, however, reads:

> 3 Jawatan yang ditawarkan ini adalah tetap dan berpencen.

[5] Literally it means that the post offered is 'permanent and pensionable'. In other words the post to which the appellant will be appointed to in the event he accepted the offer is a 'permanent and pensionable' post. By letter of the pension division of public services department dated 28 October 1988 (p 86 of appeal record) the appellant was given the pensionable status with effect from 1 December 1988. By that we take it to mean that the appellant had been confirmed in his employment and had been placed on a permanent and pensionable scheme.

[6] Then came the 'Surat Tawaran Saraan Bank Simpanan Nasional (SSBSN) kepada Kakitangan Tetap Bank Simpanan Nasional' dated 31 March 1994. (See pp 88–91 appeal record.) It is pertinent to note that this offer was addressed to permanent employees of the respondent. The appellant accepted SSBSN offered by the respondent.

[7] From the record it would appear that the appellant had, for some reasons, on and off absented himself from office. He claimed that he was absent for health reason for which he was undergoing some treatments. This problem

started in 1997 until his service was terminated by the respondent through its letter dated 11 August 1998. The termination was to take effect restropectively from 8 February 1998.

THE ISSUES AND FINDINGS

[8] The learned JC decided the case on the narrow question of whether the termination of service of the appellant vide letter dated 11 August 1998 with effect from 8 February 1998 with payment of one month's salary in lieu of notice was valid under paras 47.1 and 48.2 of the Terms and Conditions of Service.

[9] Relying on the authorities of *Gnanasundram v Government of Malaysia* [1971] 1 MLJ 208 and *Ratnam Bikal Seevaratnam v Government of State of Pahang* [1982] 1 MLJ 16 he held that the notice of termination was valid and proper and hence dismissed the appellant's claim with costs. With regret we could not agree with the conclusion arrived at by the learned JC for the following reasons.

[10] The respondent in the present case acted under paras 47.1 and 48.2, Terma Dan Syarat-Syarat Perkhidmatan Bank Simpanan Nasional ('Bab A') and the terms and conditions of service found in paras 2(c) and 2(d) of the letter of offer dated 22 June 1978. This is clearly stated in its letter of termination dated 11 August 1998. From our reading of paras 2(c) and 2(d), they clearly have no application to the appellant here since the appellant is no longer a probation officer. The appellant, as we stated earlier, had been placed on permanent and pensionable establishment as long ago as 28 October 1988. (Please see the letter of Jabatan Perkhidmatan Awam Malaysia, Bahagian Pencen at p 86 of the appeal record). We are, therefore, left to consider paras 47.1 and 48.2 of Bab A in relation to the purported termination. Paragraphs 47 and 48 of Bab A read as follows:

> 47 Kuasa Menamatkan Perkhidmatan
>
> 47.1 Bank boleh menamatkan perkhidmatan seseorang kakitangan mengikut syarat- syarat perlantikannnya.
>
> 48 Notis Menamatkan Perkhidmatan
>
> 48.1 Kakitangan dalam percubaan dan sementara bole ditamatkan perkhidmatannya dengan diberi tempoh tiga (3) bulan notisjika mereka telah berkhidmat lebih satu tahun dan satu (1) bulan notis jika mereka berkhidmat kurang daripada I tahun atau pun dibayar sebulan gaji sebagai ganti notis yang cukup, dengan tidak diberi sebarang sebab.
>
> 48.2 Atas kepentingan perkhidmatan kakitangan yang telah disahkan dalam jawatan juga boleh ditamatkan perkhidmatannya dengan diberi tiga bulan notis atau dibayar sebulan gaji, kecuali kakitangan yang ditamatkan perkhidmatanya atas sebab-sebab tindakan tatatertib.

[11] Paragraph 47.1 confers upon the respondent the right to terminate the service of any employee. However, this is subject to one important condition

that is, it must be in accordance with the terms of his employment. The appellant's terms and conditions of employment, *inter alia*, are contained in the letter of offer dated 22 June 1978. It is not in dispute that on the date of the purported termination the appellant had already been placed on permanent and pensionable scheme in accordance with para 3 of the letter of offer. For that reason the purported termination could only have been made pursuant to para 48.2 and not para 48.1 of Bab A as the latter only applies to probationary and temporary employee. Let us then consider paragraph 48.2 in its proper context. The relevant part of which provides that 'in the interest of service' an employee who had been confirmed in service may also be terminated from service by giving three months notice or in lieu thereof be paid one month's salary. From our reading of this paragraph it does not purport to give the respondent an absolute right to terminate the service of its employee, for it is subject to one important consideration that is, the termination may only be made 'in the interest of service'. It is far from clear what is meant by 'in the interest of service' as used in para 48.2 of Bab A, It is not anywhere defined in Bab A.

[12] It is appropriate at this juncture to consider the termination notice of 11 August 1998, the relevant part of which is set out below:

> Penamatan Perkhidmatan Sebagai Buruh Am (Kup) (D01–5) Di Bank Simpanan Nasional
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> Dimaklumkan bahawa pihak Pengurusan Bank telah menimbangkan semula kedudukan tuan sebagai Buruh Am (KUP) di Bank Simpanan Nasional. Dukacita dimaklumkan, oleh kerana perkhidmatan tuan dengan Bank ini *tidak lagi diperlukan*, maka pihak Pengurusan telah memutuskan untuk menamatkan perkhidmatan tuan sebagai Buruh Am (KUP) mulai 8 February 1998 berdasarkan peruntukan di para 47.1 dan 48.2 Bab A, Terma Dan Syarat-syarat Perkhdimatan Bank Simpanan Nasional serta syarat-syarat di Para 2(c) dan 2(d) dalam Surat Tawaran sebagai Buruh Am BN/IP/SULIT 54/(38) bertarikh 22 Jun 1978 yang memperuntukkan
>
> 47.1 Bank boleh menamatkan perkhidmatan seseorang kakitangan mengikut syarat-syarat perlantikannya.
>
> 47.2 Atas kepentingan perkhidmatan kakitangan yang telah disahkan dalam jawatan juga boleh ditamatkan perkhidmatannya dengan diberi tiga bulan notis atau dibayar sebulan gaji, kecuali kakitangan yang ditamatkan perkhidmatannya atas sebab-sebab tindakan tatatertib.
>
> 2(c) Tuan/puan akan berkhidmat di dalam percubaan selama satu tahun hingga tiga tahun. Sekiranya tuan/puan tidak disahkan di dalam jawatan apabila tempoh percubaan tuan/puan tamat, perkhidmatan tuan/puan mungkin ditamatkan.
>
> 2(d) Semasa tuan/puan berada di dalam percubaan, tuan/puan boleh diberhentikan dari jawatan bila-bila masa selepas diberi sebulan notis ataupun sebagai ganti notis dibayar sebulan gaji dengan tidak diberi sebarang sebab, Tuan/puan berhak meletakkan jawatan dengan memberi sebulan notis ataupun membayar balik sebulan gaji. Setelah tuan-puan disahkan dalam jawatan, notis yang dikehendaki bagi kedua-dua pihak ialah tiga bulan atau sebagai ganti notis membayar sebulan gaji.

2 Penamatan perkhidmatan tuan adalah berkuatkuasa mulai dari 8 February 1998 dengan dibayar sebulan gaji sebagai ganti notis yang cukup.

3 Sehubungan itu, tuan dikehendaki menyerahkan buku rawatan perubatan, kad pekerja dan lain-lain harta Bank (jika ada) kepada Pengurus Negeri Kedah dengan kadar segera.

4 Bersama-sama ini disertakan Borang Lampiran 'E' untuk tuan tandatangani dan sila kembalikan ke Unit Personel dengan seberapa segera untuk tindakan selanjutnya. (Emphasis added.)

[13] It is important to note that the termination was made on the ground that the service of the appellant is 'no longer required' ('tidak lagi diperlukan') and for that reason 'the Management' ('pihak Pengurusan') decided to terminate his service under paras 47.1 and 48.2 of Bab A and under paras 2(c) and 2(d) of the letter of offer dated 22 June 1978. As we stated earlier paras 2(c) and 2(d) of the letter of offer are clearly not applicable to the appellant's case and we do not propose to say any more on this. As for para 47.1 of Bab A it is clear that the power to terminate the service of any employee lies with the bank. Therefore, it is the bank and the bank alone that could exercise that power. By the word 'Bank' it means the 'Bank Simpanan Nasional' established under s 3 of the Bank Simpanan Nasional Act 1974 ('the Act'). Naturally the bank, being a statutory body operated through the 'Board' established under s 6 of the Act. In the termination letter it is stated that the decision to terminate the service of the appellant was made by 'the management'. The question is what is meant by 'the management' here, is it the Board of the Bank or any other body or person given authority by the Board. Therefore, it is open to doubt whether 'the management' here has the authority to terminate the service of the appellant under para 48.2 of Bab A. The burden lies on the respondent to satisfy the court that the so called 'management' has the authority to do what it purported to do. We found the respondent failed to do this.

[14] The other point that comes to the forefront for our consideration is the reason given for the termination of the service of the appellant. It is stated that his service is no longer required by the respondent. The respondent did not say why his service is no longer required by the respondent. The question is: does para 48.2 of Bab A confer on the respondent an unfettered power to terminate the service of the appellant without assigning any reason therefor. The answer to this may be found in what was stated by Chang Min Tat FJ in *Dr A Putt v Assunta Hospital* [1981] 1 MLJ 304 at p 314:

> The High Court judgment in *Goon Kwee Phoy* was itself overruled by another division of the Federal Court for reasons to be stated and the award of the Industrial Court of compensation to a workman who had had his contract of employment terminated by due notice, but without just cause or excuse, restored. This court had therefore held that the so-called 'termination simpliciter' which is not grounded on any just cause or excuse would enable the Industrial Court to award compensation if it would not order reinstatement.

[15] We do not think it is open to the respondent to terminate the service of the appellant simply on the premise that his service is no longer required without giving reason for it. It should be realised that what the respondent purported to do here would have dire consequences on the appellant. He will not only lose his employment but he would also be deprived of his pension benefit. As was said by Raja Azlan Shah (CJ) (Malaya) (as HRH then was) in *Goon Kwee Phoy v J&P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136:

> We do not see any material difference between a termination of contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and result must be the same where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse.

[16] We are conscious that the above statement was made in the context of industrial relation law, but we think it is all the more important here for the court to make such an enquiry since the appellant at the material time had already been placed on a permanent and pensionable scheme. Having been confirmed in the post and emplaced on the pensionable scheme the appellant's service could not, in our view, be terminated by due notice under para 48.2 of Bab A.

[17] It is also our view that what happened in this case is a colourable exercise of the power of termination under para 48.2 of Bab A, as a cloak for dismissal. What the respondent in fact intended to do here was to dismiss the appellant from the service of the respondent because of his prolong absence from office. However, instead of proceeding under the disciplinary procedure the respondent chose what it believed to be a less cumbersome procedure by resorting to paragraph 48.2 of Bab A. However, as was held in the Indian case of *Chartered Bank Bombay v The Chartered Bank Employees' Union* AIR 1960 SC 919 '... if the termination of service was a colourable exercise of power or as a result of victimisation or unfair labour practice the (Indian) Industrial Tribunal would have the jurisdiction to intervene and set aside such termination, and to go behind the termination order to see whether it was a mere camouflage for a dismissal for misconduct without following the prescribed procedure.' Eventhough the above observation was made in the context of the industrial relation law it is, in our view, equally applicable to the present case. In the circumstances, it is thus incumbent upon us to intervene in the present case in order to prevent the injustice that had been inflicted on the appellant.

[18] On the authorities relied by the learned JC, with respect, we find they are of no relevance to the present case. As the facts disclosed in *Gnanasundram v Government of Malaysia*, he was appointed as temporary officer in the Road Transport Department and the court held that he was terminated in accordance with the terms of the offer of appointment. Similarly in the case of *Ratnam Bikal Seevaratnam v Government of State of Pahang* the appellant there was a temporary officer engaged on a month to month basis, therefore, her service was rightfully terminated in accordance with the terms and conditions of service.

CONCLUSION

[19] For the above reasons we allowed the appeal herein with costs both here and in the High Court and ordered that the appellant be reinstated to his original post and be given all the benefits accruing to the post in accordance with the terms and conditions of his service. The deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Peter Ling